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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 LISA M KRZMARZICK,

11 Plaintiff,

12 v.

13 NANCY A. BERRYHILL, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
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CASE NO. 3:17-CV-05343-JRC

ORDER ON PLAINTIFF'S
COMPLAINT

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18 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
19 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
20 Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States
21 Magistrate Judge, Dkt. 6). This matter has been fully briefed. *See* Dkt. 11, 15, 16.

22 Plaintiff was working as a janitor, cleaning a vent, when she tore the medial
23 meniscus in her left knee. AR. 622. Examining physician Dr. Floyd Sekeramayi, M.D.,
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1 diagnosed plaintiff with a chronic left knee medial meniscus tear, and found that the
2 diagnosis is severely limiting. AR. 715. With respect to plaintiff's ability to sit, walk,
3 and/or stand, Dr. Sekeramayi opined that plaintiff's "maximum standing/walking
4 capacity is at least two hours. . . ." AR. 715.

5 The Administrative Law Judge ("ALJ") characterized this evidence as consistent
6 with light work. AR. 40. However, the ambiguity of Dr. Sekeramayi's opinion with
7 respect to plaintiff's maximum and minimum ability to walk and/or stand triggered the
8 ALJ's duty to conduct an appropriate inquiry and allow for proper evaluation of the
9 evidence. Moreover, to the extent that the ALJ rejected this portion of Dr. Sekeramayi's
10 opinion, the ALJ failed to provide a specific and legitimate reason supported by
11 substantial evidence. This error is not harmless, as it calls into question the ALJ's
12 reliance on Dr. Sekeramayi's opinion in finding that plaintiff is capable of performing
13 light work.
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15 Therefore, for the reason stated and based on the record as a whole, Court
16 concludes that this matter is reversed and remanded pursuant to sentence four of 42
17 U.S.C. § 405(g) for further administrative proceedings consistent with this opinion.
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19 BACKGROUND

20 Plaintiff, LISA M. KRZMARZICK, was born in 1965 and was 48 years old on the
21 amended alleged date of disability onset of June 25, 2013. *See* AR. 59, 273-79. Plaintiff
22 graduated from high school and completed a couple of years of college. AR. 61.
23 Plaintiff has work experience as a custodian/janitor, childcare worker, housekeeper and
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1 laundry aide. AR. 364-75. She left her last employment when she was injured on the
2 job. AR. 64-65.

3 According to the ALJ, plaintiff has at least the severe impairments of “Chronic left
4 knee abnormality, obesity, diabetes, hypertension, hyperlipidemia, left foot abnormalities,
5 right radiculopathy, and bipolar disorder (20 CFR 404.1520(c)).” AR. 27.

6 At the time of the hearing, plaintiff was living with her husband. AR. 62-63.

7 PROCEDURAL HISTORY

8 Plaintiff’s application for disability insurance benefits (“DIB”) pursuant to 42
9 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following
10 reconsideration. *See* AR. 156-58, 165-68. Plaintiff’s requested hearing was held before
11 ALJ David Johnson on November 3, 2015. *See* AR. 55-87. On December 17, 2015, the
12 ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled
13 pursuant to the Social Security Act. *See* AR. 22-54.

14 In plaintiff’s Opening Brief, plaintiff raises the following issues: (1) Whether the
15 ALJ provided legally sufficient reasons to reject Dr. Sekeramayi’s opinion; (2) Whether
16 the ALJ provided legally sufficient reasons to reject Dr. Kawasaki’s opinion; (3) Whether
17 the ALJ provided legally sufficient reasons to reject the lay evidence; (4) Whether the
18 ALJ provided legally sufficient reasons to reject plaintiff’s subjective symptom
19 testimony; (5) Whether in light of these errors, the residual functional capacity (“RFC”),
20 hypothetical questions, and step five finding remain supported by substantial evidence.
21 *See* Dkt. 11 at 1.
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Plaintiff contends that the ALJ erred in evaluating the medical opinion evidence provided by examining physician, Dr. Sekeramayi. Dkt. 11 at 4-9. Specifically, plaintiff argues that the ALJ did not include certain limitations contained in Dr. Sekeramayi's opinion, despite giving great weight to the opinion. *Id.* The Court notes that plaintiff does not specifically raise the issue of whether Dr. Sekeramayi's opinion is ambiguous, but appears to do so generally – contending that defendant's interpretation of the evidence was impermissible reading of the evidence. *Id.* at 5-6. Defendant argues that the ALJ's interpretation of Dr. Sekeramayi's opinion was rational in light of the overall medical record. Dkt. 16 at 2; *see* AR. 40.

ORDER ON PLAINTIFF'S COMPLAINT - 4

1 six hours. AR. 715. Dr. Sekeramayi reasoned, “[j]ustification for limitation is
2 symptomatic left knee medial meniscus tear with physical findings supporting the
3 claimant favoring the left knee such as quadriceps muscle wasting and positive
4 McMurray's sign and confirmation of meniscus tear on MRI.” *Id.*

5 The ALJ gave great weight to Dr. Sekeramayi’s opinion, but characterized the
6 limitation that plaintiff’s “[m]aximum standing/walking capacity is at least two hours[,]”
7 as consistent with light work. AR. 30, 40.

8 In order to perform the full range of light work, a person must stand or walk, “off
9 and on, for a total of approximately 6 hours of an 8-hour workday.” SSR 83–10, 1983
10 WL 31251, at *6. On the other hand, sedentary work requires periods of standing or
11 walking that “total no more than about 2 hours of an 8-hour workday, and sitting should
12 generally total approximately 6 hours of an 8-hour workday.” SSR 83–10, 1983 WL
13 31251, *5; *see also* 20 C.F.R. § 404.1567(a), § 416.967(a); *Merritt v. Colvin*, 2015 WL
14 4039355, at *1 (W.D. Wash. July 2, 2015) (a limitation to standing/walking for two hours
15 in an eight-hour day coincides with a sedentary exertional work level).

16 Here, the evidence underlying the ALJ’s interpretation is ambiguous. The ALJ
17 appears to have acknowledged this ambiguity in Dr. Sekeramayi’s opinion, but
18 interpreted the evidence as a minimum, not a maximum, stating “Dr. Sekeramayi opined
19 that the claimant’s minimum ability to stand and/or walk was two hours in an eight-hour
20 workday; he did not indicate that this was her maximum ability to stand or walk.” AR.
21 40. However, with respect to plaintiff’s ability to sit, walk, and/or stand, Dr. Sekeramayi
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1 opined that plaintiff's "*maximum* standing/walking capacity is at least two hours,"
2 suggesting that Dr. Sekeramayi may have opined exactly that. AR. 715 (emphasis added).

3 While defendant is correct that Dr. Sekeramayi's use of the words "at least"
4 theoretically *could* indicate that Dr. Sekeramayi intended the language "[m]aximum
5 standing/walking capacity is at least two hours[,]" AR. 715, to be a "floor, rather than a
6 ceiling," Dkt. 15 at 2, it is not clear from Dr. Sekeramayi's report what that ceiling might
7 be. Moreover, it seems more likely that Dr. Sekeramayi's use of the word "maximum"
8 indicates that he intended the two-hour standing/walking limitation to be an approximate
9 ceiling, not a floor. It also unclear from Dr. Sekeramayi's report whether plaintiff would
10 need to sit for a period of time after standing/walking, and if so, how long. *See* AR. 715.

12 "Ambiguous evidence, or the ALJ's own finding that the record is inadequate to
13 allow for proper evaluation of the evidence, triggers the ALJ's duty to conduct an
14 appropriate inquiry." *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (citing
15 *Smolen*, 80 F.3d at 1288) (quotation marks omitted). Although plaintiff bears the burden
16 of proving disability, the ALJ has an affirmative duty to assist the claimant in developing
17 the record "when there is ambiguous evidence or when the record is inadequate to allow
18 for proper evaluation of the evidence." *See Mayes v. Massanari*, 276 F.3d 453, 459–60
19 (9th Cir. 2001) (citation omitted). "It is simply not enough for the ALJ to bemoan the
20 dearth of medical evidence." *Held v. Colvin*, 82 F. Supp. 3d 1033, 1040 (N.D. Cal. 2015)
21 (citing *Dervin v. Astrue*, 407 Fed.Appx. 154, 156 (9th Cir. 2010) (finding ALJ criticized
22 the lack of "a treatment history with clinical and diagnostic findings" but failed to seek
23 supplemental material from claimant's doctors)). Therefore, the ALJ should have
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1 contacted Dr. Sekeramayi to resolve the ambiguity. Therefore, the ALJ erred by failing to
2 satisfy his duty to conduct an appropriate inquiry based on the ambiguous evidence.

3 Although the ALJ did not expressly reject Dr. Sekeramayi's standing/walking
4 limitation, the ALJ failed to provide any support for the conclusion that "light work"
5 would accommodate this limitation. For example, if Dr. Sekeramayi's opinion indeed
6 reflects a maximum, this undercuts the ALJ's reliance on Dr. Sekeramayi's opinion when
7 finding that plaintiff is capable of performing light work. An ALJ may "draw inferences
8 logically flowing from the evidence." *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.
9 1999) (citing *Beane v. Richardson*, 457 F.2d 758 (9th Cir. 1972); *Wade v. Harris*, 509 F.
10 Supp. 19, 20 (N.D. Cal. 1980)). However, an ALJ may not speculate. *See* SSR 86-8, 1986
11 SSR LEXIS 15 at *22. Thus, to the extent that the ALJ rejected this portion of Dr.
12 Sekeramayi's opinion, the ALJ erred in failing to capture Dr. Sekeramayi's
13 standing/walking limitation that the ALJ found was entitled to "great" weight. *See* AR.
14 40.

16 Defendant also argues that the ALJ's interpretation was rational in light of the
17 overall medical record. Dkt. 16 at 2; *see* AR. 40. Defendant points to evidence from a
18 July 2015 examination with Dr. Erin Kawasaki, D.O., which showed 5/5 strength, normal
19 stability, negative McMurray's test, and negative Apley's. Dkt. 16 at 2-3; (citing AR.
20 775-76). The ALJ stated that Dr. Sekeramayi's opinion was consistent with Dr.
21 Sekeramayi's own examination, as well as the longitudinal record. AR. 40. However, Dr.
22 Sekeramayi's report indicates that plaintiff's gait was markedly antalgic favoring the
23 lower extremity, plaintiff struggled with tandem and heel-toe walking due to pain in the
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1 left knee, and that there was wasting of the quadriceps muscle, a positive McMurray's
2 test, and confirmation of a meniscus tear on MRI. *See* AR 713-15. Thus, it is not clear
3 from Dr. Sekeramayi's report or the overall medical record that plaintiff could stand/walk
4 for approximately six hours in an eight-hour day required for light work, as the ALJ
5 found.

6 The Ninth Circuit has "recognized that harmless error principles apply in the
7 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
8 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
9 Cir. 2006) (collecting cases)). The Ninth Circuit has reaffirmed the explanation in *Stout*
10 that "ALJ errors in social security are harmless if they are 'inconsequential to the ultimate
11 nondisability determination' and that 'a reviewing court cannot consider [an] error
12 harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting
13 the testimony, could have reached a different disability determination.'" *Marsh v. Colvin*,
14 792 F.3d 1170, 1173 (9th Cir. 2015) (citing *Stout*, 454 F.3d at 1055-56). In *Marsh*, even
15 though "the district court gave persuasive reasons to determine harmlessness," the Ninth
16 Circuit reversed and remanded for further administrative proceedings, noting that "the
17 decision on disability rests with the ALJ and the Commissioner of the Social Security
18 Administration in the first instance, not with a district court." *Id.* (citing 20 C.F.R. §
19 404.1527(d)(1)-(3)).
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21 Since the ALJ's RFC assessment is predicated, at least in part, on conclusions that
22 lack substantial evidence, this Court cannot find such errors harmless. If Dr.
23 Sekeramayi's opinion indeed is a maximum of approximately two hours total of
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1 standing/walking in an eight-hour day, this opinion renders plaintiff incapable of
2 performing light work. The ALJ's ultimate non disability determination was based on a
3 finding that plaintiff could perform light work: if she cannot, this alters the ultimate
4 disability determination. *See* AR. 44. Accordingly, this case must be remanded for further
5 administrative proceedings to permit the ALJ properly to consider the medical opinion
6 evidence.

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8 Regarding challenges to the ALJ's evaluation of other medical opinions, because
9 the Court concludes that the ALJ committed harmful legal error with respect to Dr.
10 Sekeramayi's opinion, and based on the record as a whole, the Court concludes that the
11 remaining medical evidence should be evaluated anew following remand of this matter,
12 including the new evidence referenced by the Appeals Council. *See* AR. 6.

13 **(2) Whether the ALJ provided legally sufficient reasons to reject the lay**
14 **evidence.**

15 Although the ALJ found that the lay testimony was not consistent with the medical
16 evidence, *see* AR. 42, the Court already has concluded that the ALJ erred when
17 evaluating the medical evidence, *see supra*, section 1. Therefore, for this reason and
18 based on the record, the ALJ should re-evaluate the lay evidence following remand.

19 **(3) Whether the ALJ provided clear and convincing reasons for rejecting**
20 **plaintiff's testimony.**

21 Similarly, the Court already has concluded that the ALJ erred in reviewing the
22 medical evidence and that this matter should be reversed and remanded for further
23 consideration, *see supra*, section 1. In addition, the evaluation of a claimant's statements
24 regarding limitations relies in part on the assessment of the medical evidence. *See* 20

1 C.F.R. § 404.1529(c); SSR 16-3p, 2016 SSR LEXIS 4. Therefore, plaintiff's testimony
2 and statements should be assessed anew following remand of this matter.

3 **(4) Whether the RFC, hypothetical questions, and step five finding are**
4 **supported by substantial evidence.**

5 Plaintiff argues that given the errors with respect to the medical opinion evidence
6 and plaintiff's subjective symptom testimony, the RFC and hypothetical questions relied
7 on by the ALJ were not complete, such that substantial evidence did not support the step
8 five findings. Dkt. 11 at 13. The Court addressed this argument in the context of the
9 harmless error analysis, *see supra* section 1, section 3. Nevertheless, to the extent that this
10 can be construed as a separate issue, plaintiff's RFC, hypothetical questions to the
11 vocational expert and step five finding should be assessed anew following remand of this
12 matter.

13 **(5) Whether remand for a finding of disability is the proper remedy.**

14 Generally, when the Social Security Administration does not determine a
15 claimant's application properly, "the proper course, except in rare circumstances, is to
16 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,
17 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
18 forth a "test for determining when [improperly rejected] evidence should be credited and
19 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
20 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).
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1 At the first step, the court should determine if “the ALJ has failed to provide
2 legally sufficient reasons for rejecting [the particular] evidence.” *Smolen, supra*, 80 F.3d
3 at 1292 (citations omitted). Next, as stated recently by the Ninth Circuit:

4 Second, we turn to the question whether [or not] further administrative
5 proceedings would be useful. In evaluating this issue, we consider [if]
6 the record as a whole is free from conflicts, ambiguities, or gaps, [if] all
factual issues have been resolved, and [if] the claimant’s entitlement to
benefits is clear under the applicable legal rules.

7 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)
8 (citations omitted).

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10 Here, the medical opinion evidence in the record is ambiguous as to the exact
11 nature of Dr. Sekeramayi’s opined standing/walking limitation, and whether Dr.
12 Sekeramayi’s opinion supports the ALJ’s finding that plaintiff is capable of light work.
13 See AR. 40, 715. Therefore, issues remain in this case warranting remand for further
14 administrative proceedings. See *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090,
15 1105 (9th Cir. 2014) (citations omitted) (reversal with a direction to award benefits is
16 inappropriate if further administrative proceedings would serve a useful purpose); See
17 *Kail v. Heckler*, 722 F.2d 1496, 1497 (9th Cir. 1984) (remand proper where additional
18 administrative proceedings that would include “additional medical opinions regarding
19 claimant's residual functional capacity” could remedy defects). Thus, remand for further
20 administrative proceedings is appropriate.

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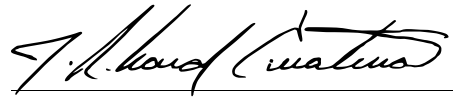
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1 CONCLUSION

2 Based on these reasons and the relevant record, the Court **ORDERS** that this
3 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
4 405(g) to the Acting Commissioner for further consideration consistent with this order.

5 **JUDGMENT** should be for plaintiff and the case should be closed.

6 Dated this 23rd day of January, 2018.

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9 J. Richard Creatura
10 United States Magistrate Judge
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